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No. 85-1033

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

JOHN J. KELLY,
CONNECTICUT CHIEF STATE'S ATTORNEY, ET AL.,
Petitioners,

v.

CAROLYN ROBINSON,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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ARGUMENT

I. IN ENACTING THE BANKRUPTCY CODE CONGRESS MADE NO ATTEMPT TO ALTER THE PREVAILING VIEW UNDER THE BANKRUPTCY ACT THAT CRIMINAL SANCTIONS WERE NOT DEBTS.

The State petitioners have argued that, by the time of the passage of the Bankruptcy Code in 1978, the courts had carved from the concept of bankruptcy debt an exception for criminal sanctions and that, since Congress in 1978 did not specifically alter this exception, this Court should presume that it sought to maintain it. Petitioner's Brief (Pet. Br.) at 19–25 (citing *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 106 S. Ct. 755, 759–60 (1986)). Respondent Robinson makes a two-step reply: 1) the basis of the 1898 Bankruptcy Act decisions was that criminal monetary obligations such as restitution were not "allowable" or "provable" debts under § 57d and § 63a, *see* 11 U.S.C. § 57d and § 103a (repealed 1979); note 2 *infra;* App. to Pet. Br. at 4A, and 2) because Congress eliminated the concepts of allowability and provability when it adopted the Code, Congress must have intended to include criminal monetary obligations within the Code definition of "debt." Respondent's Brief (Resp. Br.) at 17–20. These responses are simply not correct.

1. The Bankruptcy Act decisions in question do not depend upon the description of criminal monetary obligations as nonallowable or nonprovable debts. Of the six decisions that the petitioners quoted in their brief for the proposition that criminal sanctions were not Bankruptcy Act "debts,"

Robinson supplies her own quotations from only four. Resp. Br. at 18-19.[1] In two of these cases Robinson relies on language from lower court decisions contained within the principal opinion but not adopted by the principal court. Thus Robinson quotes the bankruptcy referee's opinion in *In re Moore*, 111 F. 145 (W.D. Ky. 1901), in an attempt to establish that criminal monetary obligations were not provable, *id.* at 148, but overlooks the reasoning of the district court, which had stated that "[t]he provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditors, as such, and not to punishment inflicted pro bono publico for crimes committed." *Id.* at 150; Resp. Br. at 18. Similarly, Robinson refers to a summary of the rationale of the appellate department of the superior court in *People v. Washburn*, 97 Cal. App. 3d 621, 158 Cal. Rptr. 822, 824 (1979), but does not focus on the rationale of the Court of Appeals, which observed that "[a] condition of restitution . . . does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution." 158 Cal. Rptr. at 825; Resp. Br. at 19.

In the other two cases addressed by Robinson, the references to the concept of provability or allowability are fleeting and insubstantial. Robinson notes the phrase "provable debt" in the following quote, thus ignoring the true purpose of the paragraph, which was to establish that criminal fines were not "debts" of any sort:

> It is no doubt true that a fine imposed for a criminal contempt is not a "debt" within the meaning of § 1(14) of the Bankruptcy Act, 52 Stat. 841, 11 U.S.C.A. § 1(14). *See In re Moore*, D.C.W.D. Ky. 1901, 111 F. 145. Being not a provable debt, liability

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[1] Robinson attemps to explain one of the other two, *Zwick v. Freeman*, 373 F.2d 110, 116 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967), on the ground that it relied on cases discussed above that supposedly considered criminal sanctions not "provable." Resp. Br. at 18-19. Robinson does not address *People v. Mosesson*, 78 Misc. 2d 217, 356 N.Y.S.2d 483, 484-85 (Sup. Ct. 1974), in which the court stated that "[a] discharge has no effect whatsoever upon a condition of restitution in a criminal sentence."

> for such a criminal fine is not affected by a discharge in bankruptcy, § 17, 11 U.S.C.A. § 35. It was not in the contemplation of Congress that the federal bankruptcy power should be employed to pardon a bankrupt from the consequences of a criminal offense, whether the criminal contempt be against the authority of a state or federal court.

Parker v. United States, 153 F.2d 66, 71 (1st Cir. 1946); Resp. Br. at 18. Finally, the court in *In re Abramson*, 210 F. 878 (2d Cir. 1914), did state that "judgments for penalties are not debts which can be proved or allowed as such because they are not for a fixed liability," *id.* at 880, but the court did not make clear whether it had in mind civil or criminal penalties. The petitioners quoted in their original brief the passage "bankrupts who have violated laws passed for the public good cannot escape punishment by going into bankruptcy," *id.*, a passage which seems to refer more plainly to criminal cases.

The concepts of "allowability" and "provability" under the Bankruptcy Act referred to whether a debt was sufficiently liquidated, capable of estimation, or fixed in liability to allow a creditor to participate in the distribution of the estate. *See* 11 U.S.C. § 93d (Bankruptcy Act § 57d) (repealed 1979);[2] 11 U.S.C. § 103(a) (Bankruptcy Act § 63a) (repealed 1979); App. to Pet. at 4A. The passing references to criminal obligations not being "provable debts," upon which Robinson relies, provide scant indication that the courts considered fines and

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[2] Section 57d of the Bankruptcy Act provided:

> Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: *Provided, however,* That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act.

restitution too contingent or speculative to fit into a bankruptcy plan. *Cf. Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 338 (1934) ("There can be no provable debt in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings, the fulfillment of which is contingent on what may happen from month to month or up to the end of the original term."). Such a position would have made little sense, since courts have invariably imposed fines and restitution in amounts that are certain and definite. Rather, it is apparent that when the courts occasionally labeled criminal sanctions as not constituting "provable debts" or as not being "provable" they were using the term "provable" loosely as a shorthand for saying that monetary criminal obligations were simply not debts that were subject to bankruptcy.

2. The fact that Congress abolished the concepts of provability and allowability in 1978 had nothing to do with whether criminal monetary sanctions constituted debts. By eliminating provability and allowability, Congress sought to bring into bankruptcy those debts that were previously "too remote or contingent," H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6266, but Congress said nothing about changing the traditional nondebt status of those obligations, such as criminal sanctions, that were outside of bankruptcy for public policy reasons unrelated to remoteness or unprovability. As mentioned in the original brief, the only expression of Congress in the legislative history on this point was its statement that "the bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial over-extension," H.R. Rep. No. 595, *supra*, at 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6299 — a statement that hardly reveals Congressional intent to reverse a consistent line of cases holding that criminal monetary sanctions were not debts. Since Congress did not even suggest that it intended the Code to change the judicially created criminal law exception to the concept of bankruptcy debts, this Court should presume that Congress sought to maintain it.

Midlantic National Bank v. New Jersey Department of Environmental Protection, supra. See also Brief of National Governor's Association, et al., as Amici Curiae in Support of Petitioners, at 11-12.

II. THE PROCESS OF OBJECTING TO DISCHARGE DOES NOT PROVIDE A REMEDY THAT ADEQUATELY PROTECTS THE INTERESTS OF THE STATES IN THE ADMINISTRATION OF CRIMINAL JUSTICE.

Robinson asserts that Congress did not intend to exclude criminal restitution orders from the bankruptcy process, particularly because some creditors have allegedly sought to transform the criminal process into a debt collection system. Instead of preserving the historic status of restitution as a nondebt, Congress, according to Robinson, intended state prosecutors — and perhaps crime victims — to file objections in federal bankruptcy court to the discharge of restitution. Robinson claims that this asserted remedy is straightforward and comprehensive. Resp. Br. at 22-23, 37-43.

These arguments contain fundamental contradictions. First, if Robinson means that debtors can challenge the good faith of the state prosecution when the state files objections to discharge, then the remedy of objecting to discharge would hardly be the simple procedure that Robinson claims it is. State prosecutors will then have to litigate the bona fides of state prosecutions in federal bankruptcy court. Such a procedure, as discussed in the petitioner's original brief, will impose hardships on crime victims, burden prosecutorial resources, require ordinarily impermissible inquiries into prosecutorial motives, erode the finality of criminal judgments, and contradict essential tenets of federal-state comity. Pet. Br. at 25-31. Surely Congress did not intend this result.

Second, Robinson has exaggerated the issue of creditor manipulation of the criminal justice system. "[T]he intentions of the complaining witnesses are not controlling in judging

the good faith of a criminal prosecution." *In re Davis*, 691 F.2d 176, 179 (3d Cir. 1982). State prosecutors represent societal interests broader than the injury to a particular victim. Robinson's interpretation of the Bankruptcy Code relies on the invalid assumption, unsupported by anything in the Code's legislative history, that Congress expected state prosecutors to misuse their governmental powers by initiating criminal charges solely on behalf of complaining creditors, rather than "on behalf of all the citizens of [the State.]" *Id.* at 178. Moreover, in many restitution cases—including this one—the state prosecution will have concluded before bankruptcy proceedings have even begun, thus dispelling all doubt as to whether the state prosecution sought to circumvent bankruptcy discharge.

Indeed, the cases Robinson cites involve state prosecutions pending at the same time as bankruptcy proceedings, *e.g.*, *In re Barnett*, 15 B.R. 504, 506 (Bankr. D. Kan. 1981), or arising after bankruptcy proceedings. *E.g.*, *In re Whitaker*, 16 B.R. 917, 919 (Bankr. M.D. Tenn. 1982). Resp. Br. at 37-39. In these cases, as noted in the petitioner's original brief, the accepted procedure for challenging the good faith of a state prosecution is to raise the issue in state court. Pet. Br. at 27 n.9. In the rare case in which state remedies are ineffective to prevent the harassment of a bankruptcy debtor, a bankruptcy court can enjoin the state court participants pursuant to 11 U.S.C. § 105(a). *Id;* Pet. at vi.[3]

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[3] The State petitioners emphasize that the type of bad faith or harassment necessary to justify the dismissal or enjoining of a state prosecution arises only in the limited circumstances when the state prosecutes "for the purpose of retaliating for or deterring the exercise of constitutionally protected rights." *Wilson v. Thompson*, 593 F.2d 1375, 1383 (5th Cir. 1979) (construing *Younger v. Harris*, 401 U.S. 37 (1971)). A state prosecution designed to retaliate for or deter the exercise of federal bankruptcy rights implicates the Supremacy Clause of the Constitution, and thus meets this high threshold. *See McDonald v. Burrows*, 731 F.2d 294, 298-99 (5th Cir.), *cert. denied*, 105 S. Ct. 173 (1984); *In re Davis*, 691 F.2d 176, 178 (3d Cir. 1982).

Thus the occasional occurrence of creditor abuse of the criminal justice system does not logically provide a reason for Congress to have made restitution nondischargeable on a case-by-case basis. The issue is likely to arise only when a state criminal prosecution takes place at the same time of or after the defendant's bankruptcy proceedings, and, in those cases, the existence of state remedies and, if necessary, the injunctive powers of § 105(a) provide all the necessary relief. In other cases, as in this case, the issue of bad faith could only serve as a spurious defense to a state's objection to discharge, thus making objection to discharge proceedings exactly the type of burdensome relitigation of the criminal trial that Robinson claims they would not be. Robinson's theory that Congress intentionally discontinued the pre-Code nondebt status of criminal restitution simply does not withstand analysis.[4]

Finally, the process of objecting to discharge is not as comprehensive a remedy as Robinson intimates. Resp. Br. at 41–42. Robinson does not specifically reveal how restitution ordered for reckless and negligent crimes, or for bribery, kickbacks, or gambling would be excepted from discharge, and it is clear that they would not be. Pet. Br. at 30. Moreover, if the state has to prove that reckless crimes in reality involved willful and wanton misconduct, or that briberies and kickback schemes in actuality involved fraud or larceny, as Robinson suggests, then the process of filing exceptions to discharge would require burdensome retrials of otherwise final criminal judgments.

Robinson ultimately acknowledges that there may be some instances in which no applicable exceptions to discharge exist, but maintains that in these cases Congress intended the fresh start policies of the Bankruptcy Code to prevail over

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[4] Most of the cases of creditor bad faith that Robinson cites, moreover, arose under the new Code. Resp. Br. at 37–39 & n.10. These cases obviously would not have provided a basis for Congress to have changed the nondebt status of restitution when enacting the Code in 1978.

the interests of the criminal justice system. Resp. Br. at 42. Robinson thus apparently believes that in certain cases Congress intended that a criminal can escape the consequences of his crime by filing a petition for bankruptcy. Congress, however, made its intentions clear in stating that "[t]he bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus criminal actions and proceedings may proceed in spite of bankruptcy." H.R. Rep. No. 595, *supra*.[5]

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[5] Robinson's reliance on *Perez v. Campbell*, 402 U.S. 637 (1971), is misplaced. Resp. Br. at 42–43. In *Perez* the state sought to penalize an automobile driver for failure to pay a discharged civil judgment. In the case at bar the question is whether the obligation—in this case a criminal judgment—constitutes a dischargeable debt to begin with. Only if this Court rules that it is such a debt will the *Perez* issue arise. Pet. Br. at 34 n.12.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petitioners' original brief, this Court should reverse the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted.

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